

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: Kamella D. Ash'shadi

Debtor.

Case No. 04-55924
Chapter 13
Hon. Marci B. McIvor

**OPINION DENYING TRUSTEE'S OBJECTIONS TO DEBTOR'S MOTION TO SELL
REAL PROPERTY**

This matter is before the Court on the Trustee's Objections to Debtor's Motion to Sell Real Property. The Trustee does not object to the sale but argues that the Debtor's share of the proceeds are non-exempt disposable income which must be contributed to Debtor's Chapter 13 plan. On April 7, 2005, the Court granted Debtor's Motion to Sell Real Property and Ordered that Debtor's share of the sale proceeds be held in escrow. For the reasons stated in this Opinion, the Trustee's Objections are denied. The proceeds from the sale of the real property are not disposable income and may be retained by Debtor.

Facts

Debtor filed a voluntary Chapter 13 petition on June 7, 2004. Debtor's assets included her residence at 15556 Lincoln, Eastpointe, Michigan, which Debtor owned with her mother (Schedule A). The residence was valued at \$130,000 with an outstanding mortgage of \$83,300. On Schedule C, Debtor exempted \$18,000 of her interest in the residence pursuant to 11 U.S.C. § 522(d)(1). An Order Confirming Debtor's Plan of Reorganization was entered on September 3, 2004. The plan provided for a 35% dividend to unsecured creditors.

On February 24, 2005, Debtor filed a Motion to Sell Real Property Free and Clear of Liens and Transferring Valid Liens to Proceeds. Debtor anticipated she would net \$13,937.50 from the sale and sought to retain the proceeds. The Trustee objected to the Motion, asserting that any proceeds received by Debtor from the sale of the property constitute disposable income under 11 U.S.C. § 1325(b)(1)(B) and should be paid into the plan in order to increase the dividend paid to unsecured creditors. On April 7, 2005, the Court issued an Order Granting Debtor's Motion to Sell Real Property and required Debtor's share of the proceeds to be held in escrow pending further order of the Court.

Analysis

In determining whether proceeds from the post-confirmation sale of a debtor's residence must be included as disposable income to fund the debtor's chapter 13 plan (and increase the dividend payable to unsecured creditors), it is useful to look at the basic structure of a Chapter 13 case under the Bankruptcy Code:

In place of liquidating non-exempt assets to pay creditors under chapter 7 of the Bankruptcy Code, Congress gave individuals with regular income the option of adjusting their debts pursuant to a plan under chapter 13. **The chapter 13 deal permits a debtor to retain all prepetition property, including earnings, assets, money in the bank and real estate. In exchange for keeping all of these assets, the debtor must commit all postpetition disposable income to the payment of creditors under a chapter 13 plan for a period of three to five years.** If the debtor makes all of the payments required under the plan, all of the debtor's dischargeable debts are discharged, and the debtor keeps all of the prepetition assets.

Postpetition disposable income does not include prepetition property or its proceeds. This is the chapter 13 debtor's bargain. Creditors of a chapter 13 debtor have no claim to any of these assets. See, *Hagel v. Drummond (In re Hagel)*, 184 B.R. 793, 796, 798 (9th Cir. BAP 1995); see also 1 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY §§ 1.7, 1.21, 1.44, 8.17 (2d ed. 1997).

In re Burgie, 239 B.R. 406, 410 (9th Cir. BAP 1999)(emphasis added).

The Bankruptcy Code defines disposable income as “income not reasonably necessary for the maintenance or support of the debtor or a dependent of the debtor.” 11 U.S.C. § 1325(b)(2).¹ “Only regular income and substitutes therfor can be counted in the determination of disposable income.” *In re Burgie*, 239 B.R. at 410. If the “asset in question is an anticipated stream of payments,” it must be included in the plan’s projected income without regard to whether the asset is exemptible. Thus, courts have held that social security, pension benefits, and disability payments are disposable income under chapter 13. *In re Schnable*, 153 B.R. 809, 819 (Bankr. N.D. Ill. 1993); *In re Hagel*, 184 B.R. 793, 799 (9th Cir. BAP 1995); *In re Jackson*, 173 B.R. 168, 171 (Bankr. E.D. Mo. 1994).

In the present case, however, the proceeds at issue are not a stream of income, but a single distribution arising from the sale of Debtor’s residence. The proceeds do not

¹11 U.S.C. § 1325 (b)(2) states:

For purposes of this subsection, “disposable income,” means income which is received by the debtor and which is not reasonably necessary to be expended –

- (A) for the maintenance for support of the debtor or a dependent of the debtor, including charitable contributions (that meet the definition of “charitable contribution” under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined at section 548(d)(4)) in an amount not to exceed 15 percent of the gross income of the debtor for the year in which the contributions are made; and
- (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

constitute disposable income and are not property of the estate. *In re Burgie*, 239 B.R. 406, 411 (9th Cir. BAP, 1999). In the *Burgie* case, the debtors sought to sell their home five days after confirmation of their chapter 13 plan. The sale netted \$63,000 to the debtors, who planned to use the funds to purchase a new home. The trustee did not object to the sale of the property or to the proposed use of the proceeds, but sought to have the proceeds held in escrow until the court issued a final order approving the purchase of a new residence. When the purchase of debtors' new residence used only \$43,000 of the proceeds, the trustee sought to modify the plan to required that the \$20,000 balance be treated as disposable income to be paid to unsecured creditors. The bankruptcy court held that the funds were not disposable income and the BAP panel affirmed:

The sale of a capital asset does not create 'disposable income' pursuant to § 1325. Disposable income under § 1325 is postpetition income received by the debtor that is not reasonably necessary for the maintenance or support of the debtor or a dependant of the debtor. § 1325(b)(2). **A debtor's prepetition homestead is a capital asset, not postpetition income. So it remains under a chapter 13 plan.** Therefore, the debtors in this case cannot be compelled to modify their plan to treat the balance of the sale proceeds as disposable income to be distributed under the plan.

In re Burgie, 239 B.R. at 410 (emphasis added). Converting a debtor's prepetition capital asset (residence) into cash through a post-petition sale alters the form of the asset, but not its nature. Post-confirmation sales proceeds do not constitute disposable income. See *In re Golek*, 308 B.R. 332,338 (Bankr. N.D. Ill. 2004)("pre-petition property includes the proceeds therefrom" and debtor cannot be compelled to use proceeds from post confirmation sale of real estate to fund plan); *In re Euler*, 251 B.R. 740, 748 (Bankr. M.D. Fl. 2000)(post-confirmation proceeds from sale of real estate not disposable income).

After confirmation of a chapter 13 plan, a debtor may volunteer to pay creditors from capital assets, and thereby relieve future income from the obligations under the plan. See e.g. *Freeman v. Schulman (In re Freeman)*, 86 F.3d 478, 481 (6th Cir. 1996)(tax refund based on prepetition income); *In re Martin*, 232 B.R. 29, 32 (Bankr. D. Mass 1999)(difference between previous mortgage payments and current lower payments; [In re] Tomasso, 98 B.R. [513], 515 (proceeds of a sale of a homestead)). However, a chapter 13 debtor cannot be compelled to do so. Even if the debtors had formed an intention to sell their house before the confirmation of their plan, they could not be compelled to use the proceeds to pay creditors under their chapter 13 plan.

Burgie, 239 B.R. at 411.

The cases cited by the Trustee in his brief do not control the disposition of the instant case because they all involve a stream of income, or a payment which replaces income, rather than the post-confirmation sale of a pre-petition asset. Specifically, *In re Freeman*, 86 F.3d 478 (6th Cir. 1996) involved a post-petition tax refund related to pre-petition income; *Stuart v. Koch*, 109 F.3d 1285 (8th Cir. 1997) involved worker's compensation benefits; *Hagel v. Drummond*, 184 B.R. 793 (9th Cir. 1995) involved social security income; *In re Gabo*, 290 B.R. 168 (Bankr. M.D. Fla. 2002) involved workers compensation; *In re Schnabel*, 153 B.R. 809 (Bankr. N.D. Ill, 1993) involved social security and pension benefits; and *In re Sassower*, 76 B.R. 957 (Bankr. S.D.N.Y. 1987) involved pension, welfare and unemployment benefits. None of these cases deal with the post-confirmation sale of a pre-petition asset.

Relying on these cases, all of which include as disposable income types of income potentially exemptible under state or federal law, the Trustee contends that the proceeds

arising from the sale of Debtor's residence should be considered non-exempt disposable income. This argument misses the mark. As explained above, the proceeds from the sale of a prepetition asset do not become property of the chapter 13 estate, therefore the debtor does not have to exempt the property and any objection to an exemption is irrelevant. "Under a chapter 13 plan, the debtor is entitled to keep all of the debtor's prepetition property, whether or not it qualifies under the applicable exemption laws." *In re Burgie*, 239 B.R. at 411.

Conclusion

For the foregoing reasons, the Trustee's Objections to Debtor's Motion to Sell Real Property are overruled. The proceeds from the sale of Debtor's real property located at 15556 Lincoln, Eastpointe, Michigan are not disposable income which is required to be paid into Debtor's plan. The proceeds shall be disbursed to Debtor.

/s/
Marci B. McIvor
United States Bankruptcy Court

Dated: May 6, 2005

cc: David Ruskin
Joseph Grima